



Douglas Wayne Buck, II, (“Buck”) appeals from the trial court’s order sentencing him to an aggregate sentence of eight and one-half years after a jury found him guilty of four counts of theft<sup>1</sup>, each as a Class D felony, one count of resisting law enforcement<sup>2</sup>, a Class A misdemeanor, and his habitual offender determination. Buck presents the following issues for our review:

- I. Whether the trial court abused its discretion by considering an aggravating circumstance not supported by the record and by improperly enhancing the sentence to compensate for Buck’s acquittal on one of the charges; and
- II. Whether Buck’s sentence is inappropriate in light of the nature of the offense and the character of the offender.

We affirm.

### **FACTS AND PROCEDURAL HISTORY**

At about 5:00 a.m. on August 8, 2007, Officer Pierce of the Lafayette Police Department responded to a call from Jerardo Pineda regarding a theft from a vehicle. When Pineda went to bed the previous night, he had left his garage door open about one foot from the ground. When he awoke, his garage door was open and he observed Buck trying to enter one of Pineda’s vehicles. When Pineda confronted Buck, he ran from the garage carrying four of Pineda’s baseball hats and a shopping bag that Pineda had placed in the back seat of his vehicle the night before. Pineda observed which direction Buck ran, and then telephoned the police. Pineda was able to provide a description of Buck to Officer Pierce.

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<sup>1</sup> See Ind. Code § 35-43-4-2.

<sup>2</sup> See Ind. Code § 35-44-3-3.

Pineda noticed that a Kenwood stereo was missing from the dashboard of his vehicle. Buck had dropped the shopping bag in Pineda's yard. Inside the bag were a white Dickies shirt and pants, a Kenwood and a Dual CD player, a wallet belonging to Jennifer Barbour, car keys, and a CD carrier. Officer Pierce drove to the address listed on Barbour's identification card. Barbour's wallet and DVD player had been taken from her van.

At approximately, 5:30 a.m. that same morning, Gary Gillham reported to police that someone had pounded on his door demanding to be let in, and stated that he had a gun. Officer Clark of the Lafayette Police Department responded to the dispatch, and observed Buck, holding baseball caps, in another person's garage in the area of the disturbance. Officer Clark asked Buck to stop, but Buck ran out of the garage and away from Clark, even after Clark identified himself as an officer. Officer Clark deployed a taser, causing Buck to fall to the ground. Buck, who was immediately handcuffed, told Officer McCoy of the Lafayette Police Department that he had been jumped by a group of black males, then changed his story to being jumped by a group of Hispanic males, and finally said that he had been battered by a group of females. No weapon was found on Buck, who smelled of alcohol.

Pineda was taken to the place where Buck was being detained by Officer McCoy, Pineda identified Buck as the person he saw running from his garage. Buck had four baseball style hats which were returned to Pineda along with his Kenwood CD Player. The shirt and pants, car keys which were found in the shopping bag, were also released to Pineda.

Several residents in that general vicinity had items stolen from their vehicles which also sustained damage. Shawn Brock was the owner of the vehicle from which the Dual CD player, later found in the shopping bag, had been taken. Buck had pounded on Gary Gillham's door, and demanded to be let in, stating that he had a gun. The door to Gillham's vehicle was ajar that morning, and all of the change from his vehicle was scattered on Gillham's front porch, flower beds, and yard, in addition to his vehicle. Gillham had seen Buck attempting to enter other vehicles in the neighborhood.

The State charged Buck with one count of burglary, four counts of theft, one count of resisting arrest, and filed a habitual offender count. The jury returned a not guilty verdict on the burglary charge, but returned guilty verdicts on the remaining counts. Buck was also found to be a habitual offender. The trial court sentenced Buck to three years executed for each of the theft convictions to be served concurrently, one year executed for the resisting law enforcement conviction, and enhanced one of the theft convictions by four and one-half years due to Buck's habitual offender status. The trial court ordered the sentences to be served consecutively. Buck now appeals.

## **DISCUSSION AND DECISION**

### **I. Abuse of Discretion**

Buck argues that the trial court abused its discretion when sentencing him. More specifically, he claims that the trial court improperly considered as an aggravating circumstance that the harm, injury, loss and damage suffered by the victims was significant and greater than the elements of theft, when it was not supported by facts in

the record. Buck also contends that the trial court enhanced his sentence “to compensate for his acquittal on the burglary charge.” *Appellant’s Br. at 1*.

Trial courts are required to enter sentencing statements whenever imposing sentence for a felony offense. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh’g*, 875 N.E.2d 218 (2007). The statement must include a reasonably detailed recitation of the trial court’s reasons for imposing a particular sentence. *Id.* If the recitation includes a finding of aggravating or mitigating circumstances, then the statement must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating. *Id.* Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion. *Id.* An abuse of discretion occurs if the decision is “clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom.”

One way in which a trial court may abuse its discretion is failing to enter a sentencing statement at all. *Id.* Other examples include entering a sentencing statement that explains reasons for imposing a sentence, including a finding of aggravating and mitigating factors if any, but the record does not support the reasons, or the sentencing statement omits reasons that are clearly supported by the record and advanced for consideration, or the reasons given are improper as a matter of law. *Id.* at 490-91.

Buck challenges the trial court’s statement regarding the harm, injury, loss and damage suffered by the victims. The trial court made the following statement at the sentencing hearing:

In terms of aggravating factors the harm, injury, loss and damage suffered by the victims is significant and greater than the elements necessary to prove the commission of the offense because there are---you're in other---on other people's property. I mean its something more sever[sic] than theft. The jury found it wasn't burglary but, you know, it was as close as you can get to burglary without being burglary.

*Appellant's App. at 53.* Buck asserts that the victims did not suffer any additional harm than the act of the theft itself. He claims that since the victims' belongings were returned to them, they did not suffer any loss. Buck contends that the record does not support the trial court's finding of harm, injury, loss and damage.

Further, Buck claims that the trial court's statement that Buck's actions were about as close to burglary without being burglary, was akin to the kind of statement disapproved of in *Gambill v. State*, 436 N.E.2d 301 (Ind. 1982). In *Gambill*, during sentencing of a defendant who was charged with murder, but convicted of voluntary manslaughter, the trial court stated that the evidence would justify a conviction of murder, that the trial judge thought murder was the offense committed, and that the jury had not reached the right verdict. 436 N.E.2d at 304. The trial court then sentenced Gambill to an enhanced sentence of twenty years. The Supreme Court held that the trial court improperly enhanced the defendant's sentence to compensate for what the trial court believed to be an erroneous verdict. *Id.* at 305.

First, the record reflects that Buck was "yanking on" Gillham's locked storm door in an attempt to open it. *Tr.* at 116-17. Gillham, while making an effort to ensure that Buck left his property, saw Buck stick his hands in his pants and heard him say, "[D]ude, I got a gun and I'll use it." *Id.* at 120. Although not specifically challenged by Buck here

on appeal, there was evidence in the record that the rooftop of Barbour's van was damaged when the attached DVD player was removed, and papers from her glove box were strewn around.

Furthermore, the record does not support Buck's argument that the trial court enhanced Buck's sentence in an effort to compensate for an acquittal the trial court thought was erroneous. Here, unlike in *Gambill*, the trial court did not say that Buck should have been convicted of burglary and that he disagreed with the verdict. Instead, the trial court noted that Buck entered the victims' properties without their permission, and made a threat to one of the victims. All of those facts are not elements of theft and are relevant to the issue of whether the harm, injury, loss and damage suffered by the victims was significant and greater than the elements of theft. The trial court did not abuse its discretion.

## **II. Inappropriate Sentence**

Buck alleges that his sentence is inappropriate in light of the nature of the offense and the character of the offender. When reviewing a sentence imposed by the trial court, we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." *See* Ind. Appellate Rule 7(B). When determining whether a sentence is inappropriate, we recognize that the advisory sentence "is the starting point the Legislature has selected as an appropriate sentence for the crime committed." *See Weiss v. State*, 848 N.E.2d 1070, 1072 (Ind. 2006). When examining both the nature of the offense and the defendant's character, "we may look to any factors

appearing in the record.” *See Roney v. State*, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007). The burden is on the defendant to demonstrate that his sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

As for the nature of the offense, the trial court noted that Buck did more than take items from the victims. Buck rifled through the victims’ possessions leaving what he did not take in a state of disarray, and caused damage when the items were more difficult to remove. Furthermore, Buck beat on the door of one of the victim’s homes, and then threatened the use of a weapon.

Buck argues that his crimes occurred as part of a single episode of criminal conduct. He concludes that the eight and one-half year sentence he received, minus the four and one-half year portion of the sentence imposed due to his habitual offender status, is the maximum sentence Buck could have received under Ind. Code § 35-50-1-2(c), and that the maximum sentence is inappropriate.

The State correctly notes that Buck was sentenced to three years executed for each of the theft convictions to be served concurrently. The one-year sentence Buck received for resisting law enforcement was ordered served consecutively to the theft convictions. But that sentence was for a misdemeanor conviction. Consequently, since the advisory sentence for a Class C felony is four years, Buck did not receive the maximum sentence under I.C. 35-50-1-2(c).

As for the character of this offender, Buck acknowledges his criminal history, which includes juvenile adjudications for battery, as a Class C felony; criminal recklessness, as a Class D felony; possession of marijuana, a Class A misdemeanor;



public intoxication, a Class B misdemeanor; minor consumption; pointing a firearm; and battery. As an adult, Buck has been convicted of two counts of theft, each as a Class D felony, and numerous adult misdemeanor offenses. Buck was out on bond for five other cases and for two petitions to revoke his probation when he committed the crimes in this matter. The sentence is not inappropriate in light of the nature of the offense and the character of the offender.

Affirmed.

DARDEN, J., and MAY, J., concur.